In the circumstances I am satisfied that this action was commenced without proper authority in the name of SBS and I would accordingly strike it out. As Huang Ee Hoe had wrongly initiated this action in SBS's name by issuing the warrant purportedly under the so-called resolution of the board to LL Kee & Co to file this writ, I think, it is only appropriate that I order that he personally bears the costs of this action and the application and I do so order.

Application allowed.

Solicitors: *LL Kee & Co*; *Reddi & Co.*

Reported by *PS Ranjan*

Public Prosecutor v Wahab bin Abdullah

HIGH COURT (JOHORE BAHRU) — PERBICARAAN JENAYAH NO 10 TAHUN 1985
LC VOHRAH J
23 SEPTEMBER 1990

Criminal Procedure — Charge — Charge in Bahasa Malaysia — Omission of certain words in statute from charge — Actual wording of statute not followed — Whether charge defective — Dangerous Drugs Act 1952, s 39B

Evidence — Witnesses — Discrepancy in evidence — Whether material

Evidence — Chemist's analysis of substance — Charge of trafficking in heroin — Whether chemist required to testify that he had weighed substance — Dangerous Drugs Act 1952, s 39B

The accused was charged under s 39B of the Dangerous Drugs Act 1952 with trafficking in heroin. At the close of the prosecution case, counsel for the accused submitted that no prima facie case had been made out against the accused because:

(1) the accused having been charged in the national language had been charged for an offence unknown to law as the statute under which he was charged was in the English language and accordingly the charge should have been framed in the English language;
(2) the charge in any event had omitted to state whether he had been trafficking either on his own behalf or on behalf of any other person and this omission made the charge defective;
(3) the charge did not follow the actual wording of s 39B(1) of the Act because of the use of the words 'telah didapati mengedar' which accordingly made the charge defective;
(4) there was a material discrepancy between the evidence of a witness who said that there was nothing abnormal in the behaviour of the accused at the time of his arrest and the evidence of another witness who said that the accused looked suspicious before and struggled at the time of his arrest;
(5) a witness had failed to repeat in his evidence a statement he had made in his police report; and
(6) the chemist who had analysed the substance recovered from the accused had failed to state specifically in his oral evidence that he had actually weighed the granular substances found in the packets that were said to have been recovered from the person of the accused upon his arrest.

Held, finding the accused guilty:

(1) There was nothing in the law which prohibited an accused person from being charged with the offence in Bahasa Malaysia. In any event the purpose of a charge is to intimate to the accused the nature of the offence alleged against him and that can be expressed in any language that is understood by the accused.

(2) The words 'on his own behalf or on behalf of any other person' do not constitute an element which is essential to complete the offence and may be omitted from the charge without affecting the legality of the charge.

(3) The addition of the word 'didapati' did not make the charge ab initio defective. At the most the word was superfluous and any person charged with trafficking in heroin must first have been found doing the act.

(4) There was no material contradiction in the statements made by the witnesses that justified the conclusion that they were lying. At most the discrepancy related to a matter of detail and did not affect the essential fact that the accused was seen carrying the incriminating package in his right hand.

(5) There was no obligation on the part of the chemist to say that he had in fact weighed the granular substances. It could clearly be inferred from his oral testimony that he weighed the contents of all the packets.

[Bahasa Malaysia summary

Yang tertuduh dituduh di bawah s 39B Akta Dadah Berbahaya 1952 dengan mengedar heroin. Apabila kes pendakwa ditutup, peguambela bagi yang tertuduh berhujah bahawa tiada kes prima facie dibuktikan terhadap yang tertuduh kerana:

(1) yang tertuduh yang dituduh dalam bahasa kebangsaan telah dituduh untuk suatu kesalahan yang tidak dikenali dalam undang-undang sebab statut di bawah mana dia dituduh adalah bahasa Inggeris, jadi pertuduhan sepatutnya digubah dalam bahasa Inggeris;
(2) pertuduhan itu apa sekali pun telah gagal menyatakan sama ada dia telah mengedar untuk dirinya sendiri atau untuk pihak orang lain dan kegagalan ini menjadikan pertuduhan itu cacat;
(3) pertuduhan tidak mengikut perkataan sebenar s 39B(1) Akta kerana penggunaan perkataan 'telah didapati mengedar' yang menjadikan pertuduhan itu cacat;
(4) terdapat perselisihan yang material antara keterangan seorang saksi yang mengatakan bahawa tiada apa-apa yang luarbiasa dalam kelakuan yang tertuduh semasa dia ditangkap dan keterangan seorang saksi lain yang mengatakan bahawa yang tertuduh nampaknya menimbulkan rasa curiga sebelumnya dan meronta semasa dia ditangkap;
(5) seorang saksi telah gagal mengulangi dalam keterangannya suatu kenyataan yang dia buat dalam repot polis; dan
(6) ahli kimia yang mengkaji bahan yang diambil daripada yang tertuduh telah gagal menyatakan secara tertentu dalam keterangan lisannya bahawa dia telah sebenarnya menimbang bahan biji-bijian yang dijumpai dalam bungkusan yang telah dikatakan diambil daripada yang tertuduh semasa dia ditangkap.

Diputuskan, mendapati yang tertuduh bersalah:

(1) Tidak ada apa-apa dalam undang-undang yang melarang seorang yang tertuduh daripada dituduh dengan

kesalahan dalam Bahasa Malaysia. Apa sekali pun, tujuan suatu pertuduhan ialah memberitahu kepada yang tertuduh sifat kesalahan yang dituduh terhadapnya dan itu bolehlah dinyatakan dalam sebarang bahasa yang boleh difahami oleh yang tertuduh.

(2) Perkataan 'untuk dirinya sendiri atau untuk pihak orang lain' tidak merupakan suatu unsur yang penting untuk menyempurnakan kesalahan dan boleh digugurkan daripada pertuduhan tanpa menyentuh keesahan pertuduhan itu.

(3) Pertambahan perkataan 'didapati' tidak menjadikan pertuduhan cacat ab initio. Yang selebih-lebihnya, perkataan itu adalah berlebihan dan sesiapa yang dituduh dengan mengedar heroin mestilah terdahulunya didapati melakukan perbuatan itu.

(4) Tidak ada percanggahan yang material dalam kenyataan-kenyataan yang dibuat oleh saksi-saksi yang membawa kesimpulan bahawa mereka telah berbohong. Yang selebih-lebihnya, perselisihan adalah berkenaan dengan perkara terperinci dan tidak menyentuh fakta penting bahawa yang tertuduh telah dinampak membawa bungkusan yang menunjukkan dia bersalah dalam tangan kanannya.

(5) Tidak ada obligasi pada pihak ahli kimia untuk menyatakan bahawa dia telah sebenarnya menimbang bahan bijibijian itu. Bolehlah diambil kesimpulan dengan jelas daripada testimoni lisannya bahawa dia telah menimbang kandungan semua bungkusan.]

[*Editorial Note*: The accused has appealed to the Supreme Court vide Criminal Appeal No 05-174-90.]

Case referred to
1 *PP* v *Ahmad bin Shafie* [1988] 1 MLJ 255 (folld)

Legislation referred to
Dangerous Drugs Act 1952 s 39B

Hadariah Syed Ismail for the Public Prosecutor.
Pritam Singh Brrard for the accused.

Cur Adv Vult

LC Vohrah J: The accused was charged as follows:

> Bahawa kamu pada 23 Ogos 1984 jam lebih kurang 9.30 pagi di kawasan rumah dalam binaan, Taman Pelangi, dalam Daerah Johor Bahru, dalam Negeri Johor, telah didapati mengedar 17 paket dadah heroin dengan jumlah berat 18.337 gram, dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

As adduced by the prosecution witnesses the evidence against the accused was as follows. As a result of information received, Inspector Jaafar bin Mohd Aris (PW3) on 23 August 1984 led a party of detectives comprising Detective Sergeant Shamsudin bin Omar, Detective Sergeant Mustafa bin Dahalan (PW4), Detective Constable Samli bin Hassan and Detective Constable Manokaran (since deceased) to a building site at 4.45am. Upon arrival at the scene they all took up an ambush position on the first floor of a house at the end of a row of unfinished terraced houses and kept observation of the scene. At 9.30am the accused was seen to arrive at the scene on a motor cycle which he parked in front of a house opposite the place where the detectives were. The accused was then seen crossing the road to the house on the other side carrying a package (P1A) in his right hand. At this point PW3 and Manokaran rushed down followed by the other detectives and arrested the accused who was then handcuffed. PW3 conducted a body search of the accused and took possession of the package. On unwrapping it PW3 found 17 plastic packets (P1A A1-A17) inside containing what was suspected to be drugs. PW3 then took the accused together with the incriminating exhibits to the Anti-Narcotics Department and handed both the accused and the exhibits to DSP Mohd Ali Yusof (PW5), the investigating officer in the case. PW3 later delivered P1A with its contents to chemist Qua Sai Chuan (PW1) at the Chemistry Department, Johore Bahru, on 28 August 1984 and received it back on 29 December 1984. P1A in its sealed envelope was kept by him in the exhibits store at the Central Police Station until its production in court for the trial. PW1 upon analysis of the contents of the 17 plastic packets found the presence of heroin amounting to 18.337g.

Counsel for the accused at the close of the prosecution case submitted that no prima facie case had been made out against the accused because:

(1) the accused having been charged in the national language had been charged for an offence unknown to law as the Act under which he was charged was and still is in the English language and, accordingly, the charge should have been framed in English;
(2) the charge in any event had omitted to state whether he had been trafficking either *on his own behalf* or *on behalf of any other person* and this omission made the charge defective;
(3) the charge did not follow the actual wording of s 39B(1) of the Act because of the use of the words 'telah *didapati* mengedar' which accordingly made the charge defective;
(4) there was material discrepancy between the evidence of PW3 who said there was nothing abnormal in the behaviour of the accused at the time of his arrest and the evidence of PW4 who said that the accused looked suspicious before and struggled at the time of his arrest;
(5) PW3 failed to repeat in his evidence the statement he had made in his police report P6 to the effect that the accused had walked towards his clients after alighting from his motor cycle; and
(6) PW1, had failed to state specifically in his oral evidence that he had actually weighed the *granular substances.*

I found no substance in any of the above grounds. As to the first ground, there is no question that Bahasa has been used in the courts since the passing of the National

Language Act 1967. I could find nothing in the law which prohibited an accused person being charged on 4 September 1984 with the present offence in Bahasa. In any event the purpose of a charge is to intimate to the accused the nature of the offence alleged against him and that, in my view, can be expressed in any language that is understood by the accused. As to the second ground, the case of *PP* v *Ahmad bin Shafie*[1] is authority for the proposition that the words 'on his own behalf or on behalf of any other person' do not constitute an element which is essential to complete the offence and may be omitted from the charge without affecting the legality of the charge. Adverting to the third ground, I did not think the addition of the word 'didapati' made the charge ab initio defective. At most the word was superfluous and any person charged with trafficking in heroin must first have been *found* doing the act. With regard to the fourth and fifth grounds, I could see no material contradiction in the statements that were made by PW3 and PW4 relating to the accused's behaviour at the scene at the time of his arrest that justified the conclusion that they were lying and that the charge was a frame-up. At most the discrepancy related to a matter of detail and did not affect the essential fact that the accused was seen carrying the incriminating package in his right hand. As to the sixth ground I could see no merit in counsel's argument that there was an obligation on the part of the chemist PW1 to say that he had in fact weighed the granular substances in the 17 plastic packets P1A A1-A17. It could clearly be inferred from PW1's oral testimony that he weighed the contents of all the 17 packets and found their net weight to be 42.701g; after analysis of the contents of each of the packets he found the total weight of the heroin in all the 17 packets to be 18.337g.

In the result, in the light of the prosecution evidence that the accused was seen carrying the incriminating package at the time of his arrest, I was of the view that a case had been made out against the accused, having regard to the presumption contained in s 37(da) of the Act.

As the original charge contained the superfluous word 'didapati' I amended the charge to read as follows:

> Bahawa kamu pada 23 Ogos 1984 jam lebih kurang 9.30 pagi di kawasan rumah dalam binaan, Taman Pelangi, dalam Daerah Johor Bahru, dalam Negeri Johor, telah mengedar 17 paket dadah heroin dengan jumlah berat 18.337 gram, dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

The charge was re-read to the accused and he claimed trial. Counsel for the accused, on being asked, indicated that he did not wish to recall any witnesses on the amended charge. I then called upon the accused to make his defence. The accused was the sole witness for the defence.

The accused's testimony was that he was 33 years of age and at the time of his arrest had been a labourer in cement works at the building site in Taman Pelangi, Johore Bahru, for about two years. On that day he arrived late for work at 9.30am on motor cycle JW 6415 belonging to a friend named Atan because his own motor cycle was out of order. Upon arrival at the place of work he parked the motor cycle at the parking lot for motor cycles and walked towards an unfinished house for the purpose of changing into his working clothes which were kept in the front portion of that building. Before he had time to change his clothes an Indian dressed in working clothes appeared on the scene and called him. This person then examined him but found nothing on his person. The Indian then handcuffed both his hands and produced his authority card showing that he was a policeman. The Indian then asked him to wait for a while and went underneath a staircase. When he came out he produced a package and asked him: 'Ini siapa punya?' He replied: 'Tidak tahu.' The Indian than brought him to the first floor of the end house where he met other anti-narcotics officers including PW3 and PW4. Later he was brought to the Anti-Narcotics Office at Kampong Kubor where he was interrogated and where he produced his report of loss of identity card P8. After that he was taken to the Central Police Station, Johore Bahru.

The accused in his evidence refuted the evidence of the prosecution that he was seen carrying a package whilst crossing the road or that he struggled when he was handcuffed or that he was looking to the left and to the right when he rode in on the motor cycle.

In cross-examination, he said he earned $30 to $40 a day as a labourer and worked 28 days in a month. He admitted to having been a drug addict since 1981 until before his arrest and to being in the habit of consuming three to four tubes a day. He stated further that three to four people sold drugs in Taman Pelangi and he got his supply from two persons and paid $4 for each tube.

After considering the totality of the evidence I was left in no doubt as to the truth of the prosecution evidence that the accused had been seen crossing the road at the building site with the incriminating package in his right hand and that he was arrested with the package still in his hand. There was no reason for PW3 and PW4 to lie about this fact and there was no evidence of any ill-will being entertained by them towards the accused. As to the discrepancy in their evidence with regard to the conduct of the accused before his arrest and at the time of his arrest, it was my considered opinion that it was only a minor discrepancy which did not affect their credibility as witnesses of truth. PW3

stated that the accused looked to his right and to his left when he stood in front of the house when he and Manokaran rushed down, that the accused looked startled after arrest and that he stood normally and did not attempt to run away. This statement in my view did not contradict what PW4 said about his seeing the accused being in a state of fright when he was arrested and that he struggled and was restrained by Manokaran. PW3's statement that it was PW4 who handcuffed the accused did not in my view vitiate PW4's whole testimony as PW4 in examination-in-chief did testify that he had handcuffed the accused and it was only in cross-examination that he said Manokaran had done so. This contradiction on the part of PW4, in my view, was not serious and did not relate to the crucial fact that the accused was seen with the incriminating packet in his right hand. The accused himself in his evidence-in-chief stated at one point that it was an Indian police officer who had handcuffed both his hands and later on mentioned that he did not put up a struggle when PW4 handcuffed him. In all probability it was Manokaran who had clasped the handcuffs on the accused's hands. It was submitted in passing by counsel that it was unfortunate that Manokaran was not around to tell his tale and that no formal evidence had been furnished to establish his death. I did not think that Manokaran's evidence was essential to prove the prosecution case nor did I think it was necessary to establish his death formally as no attempt was made by counsel during cross-examination of PW3 and PW4 to question his existence when they referred to him as the deceased. I had no reason to doubt the veracity of PW3 and PW4. The defence version did not create any reasonable doubt as to the truth of the prosecution case. I, accordingly, found the accused guilty as charged and sentenced him to death.

Accused convicted.

Solicitors: *Syarikat Pritam Singh.*

Reported by *PS Ranjan*

Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd

HIGH COURT (PENANG) — CIVIL SUIT NO 22-202-90
EDGAR JOSEPH JR J
8 SEPTEMBER 1990

Civil Procedure — Estoppel — Judgment in previous suit — Whether party to new action estopped by judgment — Estoppel against statute — Whether permitted

Civil Procedure — Order extracted — Whether may be varied — Power of court to order variation

Contract — Terms — Implied by statute — Whether parties may contract out of such terms — Public policy

Land Law — Lease — Option for renewal — Option not exercised — Lessee remaining in occupation and paying monthly rent — Tenancy exempt from registration created — Non-endorsement of such tenancy on register — Effect of — Charge over land subsequent to lease — Land sold — Whether purchaser's interest subject to lessee's interest — National Land Code 1965, ss 213(3), 221(4), 222(4), 223(1), 227(1), 228(1)(a), 267 & 316(1)

Landlord and Tenant — Lease — Option for renewal — Option not exercised — Lessee remaining in occupation — Whether lessee a tenant on a monthly basis — Whether purchaser's interest subject to lessee's interest

The defendants had purchased a certain immovable property at a public auction held pursuant to an order for sale made by the court under the provisions of the National Land Code 1965 upon the application of the party to whom the property was charged. Among the conditions of sale was condition 8 which provided that the property was sold subject to all existing tenancies, if any, and all claims of tenants and occupiers by contract, custom, statute or otherwise, and condition 12 which provided that 'upon payment of the balance of the purchase money the purchaser shall be let into possession or the receipt of the rents and profits of the properties'.

On 22 March 1966, the plaintiffs had gone into occupation of the property pursuant to a registered lease granted by the previous owners. The lease was for a period of ten years but carried a term that the plaintiffs had the option to renew the lease for a period of ten years at an increased monthly rental and thereafter for a further period of ten years at a further increased monthly rental. It was a term of the lease that the plaintiffs, if desirous of exercising the option, had to give notice of their desire six months before the expiry of the period. The plaintiffs had not exercised the option in the manner or within the time specified or at all but had continued in occupation of the property. Upon expiry of the initial period of ten years, the then owners of the property had continued to receive rent from the plaintiffs.

The defendants had taken out an originating summons claiming against the plaintiffs' possession of the property under O 89 of the Rules of the High Court 1980. Another judge had held in that case that the summary procedure under O 89 did not apply as the plaintiffs were tenants holding over after termination of their tenancy. The plaintiffs then commenced the instant action by writ of summons, claiming, inter alia, a declaration that they were the lawful tenants of the property, and an order that the defendants be restrained from interfering with or disturbing their lawful and actual possession and use of the property. The plaintiffs obtained on an ex parte ap-